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IN THE

Supreme Court of the United States

No. 68-5027

EARNEST JAMES AIKENS, JR., *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 69-5003

WILLIAM HENRY FURMAN, *Petitioner,*

v.

GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 69-5030

LUCIUS JACKSON, JR., *Petitioner,*

v.

GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE

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The State of Alaska by its Attorney General, John E. Havelock, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The applicant has an interest in this case in that its citizens in their travels are subject to the laws of her sister states. Should a citizen of the applicant state commit a capital crime outside Alaska, the Eighth Amendment should not allow the death penalty to be applied.

Of greater concern: when it is not necessary to the protection of the public, official sanction of the excessive use of mortal violence anywhere in the United States is corruptive of individual attitudes concerning the sanctity of human life and encourages the casual use of violence. Since Alaska has no way to close her boundaries from this influence which pervades through media and migration, the peace of the State of Alaska is thereby endangered.

Further, the court may find an explanation of the Alaskan constitutional experience with "cruel and unusual punishment" of use in determining objective standards by which the Eighth Amendment is to be applied. Measured against this standard, the death penalty is excessive and "cruel and unusual."

The briefs of petitioners do not provide this insight.

Wherefore, applicant prays that attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

STATE OF ALASKA

By: John E. Havelock
Attorney General
State of Alaska

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BRIEF OF STATE OF ALASKA AS AMICUS CURIAE

I

THE MINIMUM REQUIREMENTS OF THE EIGHTH AMENDMENT MEASURED BY AN "OBJECTIVE" TEST, THE NEEDS OF SOCIETY, RENDER THE DEATH PENALTY UNCONSTITUTIONAL AS "CRUEL AND UNUSUAL PUNISHMENT"

Petitioner argues that where it is practical to avoid the death penalty, it is morally and legally intolerable not to do so. By implication, petitioner asserts that an evaluation of the needs of present society provides an objective standard which should be applied in defining "cruel and unusual punishment". The State of Alaska concurs in this view.

In early American experience various forms of inhumane punishment were common. The reason that these same penalties are "cruel and unusual" today is that they are excessive in light of the needs and capabilities of contemporary society.

Social necessity as a constitutional standard has ample precedent. For example standards governing the exercise of free speech are formulated in terms of what society can tolerate.

In *Schenck v. U.S.*, 249 U.S. 47 (1919), dealing with the distribution of anti-war literature, Justice Holmes said:

> "The character of every act depends upon the circumstances in which it is done (p. 52).

Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357 (1927) said:

> "To free men, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." (p. 377)

In other words, whether a speaker has gone beyond the protection of the first amendment is gauged by the social necessity of limiting the particular form of speech.

Courts have taken the same approach in other areas of constitutional law. In *Terry v. Ohio*, 392 U.S. 1 (1968), the court upheld a limited power in police to "stop and frisk" for weapons without a warrant and without the full measure of probable cause required for an arrest. This holding stems from the court's awareness of the importance of protecting the policeman as an agency of organized society.

The Alaska Constitution Makes Explicit the Basic Idea Contained in the Eighth Amendment

Section 12 of Article I of the Constitution of Alaska fol-
ws verbatim the language of the Eighth Amendment to
e Federal Constitution. In addition, however, the Alaska
ovision states:

> "Penal administration shall be based on the prin-
> ciple of reformation and upon the need for protect-
> ing the public."

his language is at the heart of Alaska's criminal law. It
ovides a definition of the goals of criminal law and a mea-
re of "cruel and unusual punishment".

Present American society, unlike eighteenth century soc-
y, has the ability to construct and staff penal institutions
hich make the death penalty unnecessary. Alaska, by rea-
n of its remoteness, great size, small population and cli-
tic conditions faces considerable difficulty in housing long
rm prisoners. Yet Alaska has abolished the death penalty
LA 1957, ch. 132).

lt is difficult to argue that those presently under sentence
death cannot be accommodated by our society. Life
ntences are served; rehabilitation does sometimes occur.
e man convicted of capital crime does not pose such a
eat to society that it can only respond effectively by
ing his life. Society can accomplish its goals with
pect to capital criminals by life imprisonment. Accord-
ly, the death penalty is excessive in relation to the needs
society and, we submit, a violation of the Eighth Amend-
nt.

II

EVEN UNDER THE MORE "SUBJECTIVE" TEST OF THE REQUIREMENTS OF THE EIGHTH AMENDMENT DERIVED FROM *ROBINSON v. CALIFORNIA, WEEMS v. U.S., AND TROP v. DULLES*, THE DEATH PENALTY IS "CRUEL AND UNUSUAL PUNISHMENT."

Trop v. Dulles, 356 U.S. 86 (1958), does not provide positive support for the constitutionality of the death penalty. It is true that Chief Justice Warren stated in dictum that because the death penalty was widely accepted it did not exceed the constitutional limits on punishment. However, as petitioner argues, the attitudes of society toward the death penalty have changed measurably since the *Trop* decision.

Moreover, the *Trop* case as a whole does not comport with the dictum paraphrased above. In *Trop*, the court faced the question of whether denationalization as punishment for wartime desertion was cruel and unusual. The dictum in question arose from the court's effort to rebut the argument that because the death penalty could have been imposed, denationalization could also. The court's grudging acknowledgement of the currency of the death penalty in 1958 is hardly an endorsement of the enduring constitutionality of that practice. See p. 99.

Trop, *Robinson*, and *Weems* provide a subjective test by which to apply the Eighth Amendment standard. The test, basically, is whether the penalty shocks the conscience of the court under the circumstances. Thus, the Court spoke in terms of "contemporary human knowledge", *Robinson v. California*, 370 U.S. 660, 666 (1962); "public opinion . . . enlighten by humane justice", *Weems v. United States*, 217 U.S. 349, 378 (1910); the "evolving standards of decency that mark the progress of maturing society", *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Evidence marshalled in petitioner's argument indicates that the death penalty is unusual when its actual incidence

ed to the class of cases where it could be applied
r's brief, pp. 58-61) and that it has become even
rarity since the *Trop* decision. (*ibid.* pp. 36-38)

despread and growing opposition to the death pen-
elf evidence of public abhorrence of a penalty so
nd final. Accordingly, even under the more sub-
t used in the cited cases, the death penalty should

CONCLUSION

te of Alaska urges the Court to adopt the com-
objective standard made explicit by the additional
f the Alaska Constitution, but also inherent in
Amendment itself. The need for protecting the
gauge for the constitutionality of punishment
te the death penalty to a place in the past history
s development toward humanity.

Respectfully submitted,

STATE OF ALASKA

By: John E. Havelock
Attorney General